SUPREME COURT, U.S.

No. 1015

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In the

Supreme Court of the United States

October Term, 1967

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

REPLY BRIEF OF AMICI CURIAE AMERICAN FRIENDS SERVICE COMMITTEE, COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST, GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH, THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY, UNION OF AMERICAN HEBREW CONGREGATIONS, CENTRAL CONFERENCE OF AMERICAN RABBIS and THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM

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Amici anticipate that the reply brief of petitioner will make appropriate response to the contentions of respondents and will comment on the very recent decision of the Fourth Circuit in *Crawford* v. *Bounds*. Accordingly we shall confine ourselves to the retroactivity question, as that issue may determine the life of hundreds.

I.

THE COURT'S RULING, IF FAVORABLE TO PETITIONER, SHOULD APPLY AT LEAST TO ALL PRESENTLY UNDER SENTENCE OF DEATH

These amici urge that this Court's ruling, if favorable to petitioner, should apply at least to all men presently under sentence of death and to Bumper, petitioner in the companion case, No. 1016. We think it would be inappropriate for these amici to express an opinion as to the further extent of retroactivity, e.g., to men tried before death qualified juries but not sentenced to death, those sentenced to death but who received commutation, etc. Bumper should receive the benefit because of the general rule that a litigant whose case serves as a vehicle for enunciation of a constitutional principle receives the benefit of the principle. *Stovall* v. *Denno*, 388 U.S. 293 (1967).

The question of retroactivity has at least three facets which perhaps have not been clearly separated in the three briefs which discuss the question:[1]

1. Should the ruling be made retroactive?

2. If it is made retroactive, who should obtain the benefits of retroactivity?

3. What relief should be granted to those entitled to such benefits?

Our views are as follows:

1 and 2. If this court rules in favor of Witherspoon and Bumper on the principal issue, it is unthinkable to us that the ruling would not apply retroactively, at least to all persons now under sentence of death. The LDF-NORI

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[1] LDF-NORI Br.85-93, Madden Br.29-33 (both favoring retroactivity) and briefs of amici attorneys general of California and other states (25-35) (opposed).

brief, pages 85-93, spells out in persuasive language the reasons for so holding.

The religious organizations now before this Court as amici desire particularly to urge this course. To take a human life with deliberation under any conditions is to us profoundly shocking, even where the legal proceedings pursuant to which life is taken are impeccable. But to take a life pursuant to a procedure declared by this Court to be unconstitutional is utterly abhorrent.

Perhaps because of these considerations, the briefs of respondents, the Attorney General of Illinois and the State's Attorney of Cook County are silent on the question of retroactivity although Illinois and Cook County both would be affected by a decision of this Court favoring retroactivity. Presently there are in Cook County 12 persons, and in all of Illinois 22 persons under sentence of death.

Prior holdings of this court on the retroactivity issue, we believe, light the path for decision here. Thus, where the new rule relates to the integrity of the truth seeking process itself, the rule has been given retrospective effect: so held this court concerning the right to counsel rule of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) and the coerced confession rule of *Jackson* v. *Denno,* 378 U.S. 368 (1964). See *Tehan* v. *Shott,* 382 U.S. 406, 416, (1966). Here we assert that the death qualified jury is an improper instrument for guilt determination. It thus goes to the heart of the truth seeking process. If this court holds that it is the punishment aspect of the trial only that is affected by such a jury, then we submit the imposition of the death sentence by an improperly constituted jury also justifies retroactivity. No one should perish whose case is essentially open to one who is saved.

The chief cases denying retroactivity fall on a different plane. Thus *Linkletter* v. *Walker*, 381 U.S. 618 (1965) declined to make retroactive the *Mapp* holding excluding evidence seized in violation of the search and seizure provisions of the Fourth Amendment. A basis for the decision perhaps was that the exclusionary rule itself was not designed essentially to benefit a defendant but to vindicate effectively the Fourth Amendment. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) declined retroactivity to the *Escobedo* and *Miranda* confession rules. There it may be that the enormous number of retrials, including many very old cases, was a decisive consideration. *Tehan* v. *Shott*, 382 U.S. 406 (1966) refused retroactivity to the rule forbidding prosecution comment on the failure of an accused to testify. *Stovall* v. *Denno*, 388 U.S. 293 (1967) had to do with the retroactivity of the rule concerning counsel at police line ups. Both *Tehan* and *Stovall* may rest essentially on the *Johnson* basis.

It is *Stovall* that sets forth standards. We submit that applying those standards here should result in retroactivity. As to (a), the purpose to be served by the new standard: we have argued above the purpose is to permit guilt-innocence and life or death punishment decisions to be made by a constitutionally selected jury. As to (b), the extent of reliance by law enforcement authorities on the old standards: it is essential to note that the principle question is an issue that arises *at trial*, not prior thereto. Hence there is no reliance in the sense of action taken or omitted by the authorities that render prosecution more difficult. ((cf. *Stovall and Linkletter*). A retrial under a constitutional procedure does not discomfit the authorities beyond the fact of the retrial itself.

As to (c), the effect on the administration of justice: this we discuss below in connection with the Attorneys General amicus brief.

We turn to the Attorneys General brief. We claim, retroactivity only for those presently under sentence of death (and Bumper), not for everyone tried before a death qualified jury. This suggestion, the Attorneys General find "utterly preposterous," (p. 32) claiming that if "the jury selection procedures attacked denied [the condemned] a fair trial on the issue of guilt, there is no rational basis whatever for differentiation as to retrospective application between those who did and those who did not receive the death penalty." To us the distinction seems the ultimate of rationality—it is the distinction between life and death.

The Attorneys General urge that a rule in favor of retroactivity would create chaos (pp. 29-32), estimating that approximately 8500 persons would be entitled to relief. We submit this is not a burdensome number for the country as a whole. For the reasons advanced above, however, we do not urge retroactivity for this full group but only for the 400 or so presently under death sentence. The most recent data available to us is that contained in the Bureau of Prisons, National Prisoner Statistics, Executions, 1930-1966. That report, states that as of December 31, 1966 there were 406 persons under sentence of death. The 406 cases were originally sentenced as follows:

CAPITAL CASES PENDING DECEMBER 31, 1966.
BY YEAR INITIALLY SENTENCED[1]

Year	Number	Cumulative Number	Cumulative Percentage
1966	111	111	27.34
1965	74	185	45.57
1964	63	248	61.08
1963	42	290	71.43
1962	33	323	79.56
1961	30	353	86.95
1960	28	381	93.84
1959	12	393	96.80
1958	2	395	97.29
1957	4	399	98.28
1956	4	403	99.26
1955	1	404	99.51
1954	-	404	99.51
1953	2	406	100.00
	Total 406		

[1] Source: National Prisoner Statistics, Executions, 1966, Figure D, p.4. We have added the cumulative number and percentage columns.

Thus we see that 111 or over 27% of the 406 cases pending on December 31, 1966 were sentenced that year, 290 or over 61% within the last three years and 323 or nearly 80% within the last 5 years. We mention five years because that is the age of the law jury cases now being tried in Cook County where this case originated. We are not suggesting it is desirable to try cases of that age, but only indicate that we do it daily. What we do routinely for these cases we can do as a matter of exception for these condemned men.

Thus there is no real burden of trying very old cases. True, the percentages for 1967 and 1968 may vary somewhat, but should not be too different. In any event, if we must decide between fundamental constitutional rights, between life itself, and administrative convenience, surely constitutional rights, and life should prevail. Far better that we incur inconvenience than that a single man should go wrongly to his death. Better that a few, perhaps guilty, escape death, or escape further punishment than that a single person die wrongly.

Moreover, a large percentage of these 406 cases (or current comparable number) will not remain as capital cases because of commutations, affirmances as to guilt with sentence reduced, affirmances as to guilt with remand as to penalty, reversals and remands, and reversals. Some may so have pleaded guilty or received bench trials and thus not be within the scope of the ruling. Hence the number requiring retrial because of a retroactive ruling here, will be substantially reduced.

A concluding observation: we suggest retroactivity for Bumper and the men presently under death sentence. This group is a well defined small group. The issue at bar relates specifically to capital cases and to these cases the benefit necessarily will be confined. True, in *Stovall* retroactivity was denied, but there the issue was of wide import and the case was only nominally a capital case because the Governor of New York had announced an intention to commute the sentence because New York had narrowed the scope of the death penalty. *Johnson* was a capital case, but there too the substantive issue was broad. If these differences are not distinctions, we ask that *Johnson* be modified to create a special rule for capital cases. It seems to us that capital cases do merit

special treatment here, just as they receive special treatment by statute (e.g. provision for automatic state court appeals, etc.).

Surely retroactivity should not depend on nice distinction between direct and collateral attack, between "final" an "non final" judgments, etc. We are deeply disturbed by the Attorney General's suggestion (Br. 34) that benefits be accorded Bumper but denied Witherspoon—on whatever basis, in light of the fact that *Bumper* is not a capital case and *Witherspoon* is.

Similarly we ask the Court to reject the Attorneys' General "harmless" error suggestion, Br.30,n3. It assumes perhaps erroneously that questions on scruples against the death penalty are proper. It assumes without basis that a prosecutor would elect to use up a peremptory challenge on every scrupled juror. Finally it necessarily assumes that the prosecutor would win the race to find 12 non-scrupled veniremen otherwise acceptable to him, and not removed for cause or peremptorily by the defense—before he ran out of peremptory challenges. Life and death issue should not be decided on such a cascade of assumptions.

Further, we think the retroactivity question, as to the group under sentence of death, at least, is ripe for decision and thus disagree with LDE-NORI Br. 79-85. There may be reasons for not extending retroactivity at this time beyond the group we have suggested, as the broader group is unknown as to number, age of cases etc. But surely these considerations are not relevant to the limited group we are concerned with. To forego a ruling would leave the matter utterly unsettled for an indefinite period. These condemned men should not be left to face the further agony of indecision on a question so vital to them.

3. The third question has to do with the relief that should be granted to pending capital defendants, assuming that the rule is to be made retroactive. It seems to us that the nature of the remedy depends in large measure upon the views that this Court takes as to the merits. If the Court is convinced, as we hope it will be, that the exclusion of scrupled jurors has an important impact, not only upon the determination of the penalty but also upon the guilt-innocence determination, then it seems to us that a new trial surely should be granted. If the court believes that the scrupled juror rule has a primary impact upon the determination of the penalty then it seems to us that some other relief (e.g., retrial of the penalty issue only) might be appropriate.

CONCLUSION

We respectfully urge the Court to hold that whatever new rule this Court announces on the merits should be retroactive for all men presently under sentence of death.

Respectfully submitted

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